Editor's note: Appealed -- dismissed, sub nom. Bristol Bay Native Corp. v. Morton, Civ. No. A75-63 (D.Alaska)

STATE OF ALASKA

IBLA 75-186 Decided March 18, 1975

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting state applications for selection of land.

Affirmed in part; reversed in part.

1. Alaska: Land Grants and Selections: Generally -- Alaska Native Claims Settlement Act: Village Selections -- State Selections

   Lands withdrawn by Section 11(a)(1) & (2) of the Alaska Native Claims Settlement Act are subject to selection by qualified native villages notwithstanding the prior tentative approval of selections of those lands by the State of Alaska pursuant to the Statehood Act.

2. Alaska: Land Grants and Selections: Generally -- Alaska Native Claims Settlement Act: Village Selections -- State Selections

   Where the State of Alaska had received tentative approval of a land selection and had granted a patent to a third party in accordance with § 6(g) of the Alaska Statehood Act, and where the state patent was granted before the enactment of the Alaska Native Claims Settlement Act, with the express approval of the various native groups then concerned, a native village may not later select those lands pursuant to the Alaska Native Claims Settlement Act, as a valid third party right to the land had already been created.

3. Alaska: Land Grants and Selections: Generally -- Alaska Native Claims Settlement Act: Village Selections -- State Selections -- Surveys of Public Lands: Generally

   Where statute and regulation provide that lands selected by the State of Alaska must be surveyed before patent can issue, but no similar requirement has been imposed as a precondition to the conveyance of lands selected pursuant to the Alaska Native Claims Settlement Act, the State's contention that this disparity is discriminatory will not afford a basis for reversing a decision which rejected a state selection application in favor of a conflicting native village selection.

4. Alaska: Land Grants and Selections: Generally -- Alaska Native Claims Settlement Act: Village Selections -- State Selections

   The fact that filing fees are required as a condition precedent for state selections and are not required for native village selections pursuant to the Alaska Native Claims Settlement Act is not a basis for vacating a decision awarding lands to the native villages.

APPEARANCES: F. J. Keenan, Director, Department of Natural Resources, State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska appeals from four separate decisions dated September 25, 1974, which rejected state applications to select land pursuant to the provisions of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, as set forth in 48 U.S.C. Chapter 2 (1970). All four decisions rejected the State of Alaska's applications to select lands on the grounds that the lands have been selected by various native villages pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. (Supp. III, 1973). The State of Alaska asserts different grounds for each appeal. In each instance the land lies within the "core" township of the village which has selected the land.

[1] State selection application A-054379 was filed on May 3, 1961, for certain lands in T. 13 S., R. 55 W., Seward Meridian, Alaska. The application was amended several times to include or exclude certain lands. On December 18, 1971, the Alaska Native Claims Settlement Act (hereinafter cited ANCSA), 43 U.S.C. § 1601 et seq. (Supp. III, 1973) was enacted. That law provides that each eligible village shall select its proportionate entitlement from all of the township(s) in which the village is located and from certain other lands as prescribed. 43 U.S.C. § 1611 (Supp. III, 1973). ANCSA also provides that such selections may include lands already selected by the State of Alaska pursuant to the Alaska Statehood Act, notwithstanding that such lands may have been tentatively approved for patent. 43 U.S.C. §§ 1610(a)(1) and 1611(a)(1) (Supp. III, 1973). This is further articulated in the Departmental regulation, 43 CFR 2651.4, which provides in pertinent part, the following:

> * * * Village corporations * * * may not select more than:
>
> (1) 69,120 acres from land that, prior to January 17, 1969, has been selected by or tentatively approved to, but not yet patented to the State under the Alaska Statehood Act; * * *

All ANCSA selections are, however, subject to "valid existing rights." 43 U.S.C. § 1610(a)(2) (Supp. III, 1973). The lands in question were selected by Choggiung, Ltd., the corporate name of the native village of Dillingham. Dillingham is eligible to select lands as a native village pursuant to ANCSA. Since the lands were thereby subject to the transcendent right of selection by the village, the State's application for selection was rejected by the Bureau of Land Management (BLM) by its decision of September 25, 1974.

The State of Alaska asserts that its selection or identification of lands for selection creates "valid existing rights" which prevent native villages from selecting and receiving patent to the lands. However, as we have already noted, ANCSA specifically provides that native villages which are eligible may select land even though such land has been tentatively approved for patent to the State of Alaska. 43 U.S.C. §§ 1610(a)(1) and 1611(a)(1) (Supp. III, 1973). Edwardsen v. Morton, 369 F. Supp. 1359, 1376, fn. 36 (D. D.C. 1973).

Since the eligible native village of Dillingham has selected the lands in question pursuant to ANCSA, the State of Alaska's application for those lands must be rejected.

[2] On March 4, 1966, the State of Alaska filed selection application A-067435 for lands located in sections 2 and 3, T. 17 S., R. 47 W., Seward Meridian, Alaska. By decision of April 9,

1969, the BLM gave tentative approval to the State selection of a five-acre tract for community purposes, lot 23 of section 2. BLM gave tentative approval to the selection after all three native groups in the area withdrew their objections to issuance of patent to lot 23. On May 9, 1969, the State of Alaska granted its patent to lot 23 to Bristol Bay Borough, which intended to use the lot as a school site. Section 6(g) of the Alaska Statehood Act expressly authorizes the State of Alaska to grant conditional leases and to make conditional sales after receiving tentative approval of state selections but before the State has received final patent from the federal government. P.L. 85-508, 72 Stat. 339, 341-42, 48 U.S.C. Chapter 2 (1970). Subsequent to the State's granting of conditional patent, the land in question, lot 23, was selected by the native village of Naknek. The BLM then vacated its decision of April 9, 1969, which gave tentative approval to the selection, and rejected State application A-067435 for selection of land. The State of Alaska argues that the patenting of the land to the Bristol Bay Borough, with the approval of the federal government and the native groups involved, created a valid existing right. We agree.

Section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (Supp. III, 1973) provides in part that:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

While that portion of ANCSA does not explicitly state that patents issued by the State of Alaska are to be considered valid existing rights, when read in conjunction with another part of ANCSA, that conclusion is virtually inescapable. Section 11(a)(2) of ANCSA, 43 U.S.C. § 1610(a)(2) (Supp. III, 1973), provides that:

> All lands located within townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under

> the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State of Alaska. (Emphasis added).

The implication of that section is that third party interests already created by the State of Alaska are to be treated as valid existing rights, while the creation by the State of new third party interests is prohibited. Therefore, where patents have been granted by the State of Alaska before the enactment of ANCSA and before receipt of final patent from the federal government, and particularly where all the native groups then concerned expressly approved the State's acquisition of the land for that purpose, a valid existing right has been created. The BLM decision with respect to lot 23 must be reversed.

[3] On December 27, 1968, the State of Alaska filed application AA-5233 for lands in the Bristol Bay area. In October, 1973, several other applications were combined with AA-5233. The combined application covered all then available land in T. 38 S., Rs. 59, 60, 61 W., Seward Meridian, Alaska. On January 17, 1974, the native village of Meshik selected all available land in T. 38 S., R. 59 W., SM. The BLM then rejected State selection application AA-5233 as to the land in T. 38 S., R. 59 W., SM, and suspended the application as to T. 38 S., Rs. 60, 61 W., SM, pending the possible selection of those lands by either the native village of Port Heiden or the Bristol Bay Regional Corporation.

The State of Alaska asserts on appeal that it is being treated unfairly in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq. (1970). Though the State does not point to a violation of any specific section of that Act, it does contend that it is unequal treatment to require that land it selects must be surveyed before it is patented to the State, but survey is not required prior to the issuance of patent to various native groups. We note, however, that section 6(g) of the Alaska Statehood Act, 48 U.S.C. Chapter 2 (1970) provides, at least inferentially, that all lands selected by the State of Alaska must be surveyed before patent may issue. That section also provides that lands selected by the State shall be selected "in conformity with such regulations as the Secretary of the Interior may prescribe." Pursuant to that authority, the Secretary promulgated the following regulation, codified as 43 CFR 2627.3(b)(3):

> Patents will be issued for all selections approved under the act by the authorized officer of the Bureau of Land Management but such patents will not issue unless or until the exterior boundaries of the selected area are officially surveyed.

By contrast, sections 13(b) and 14(a) of ANCSA, 43 U.S.C. §§ 1612(b) and 1613(a) (Supp. III, 1973), do not prohibit the issuance of patent to a native village immediately upon the selection of the lands and before a survey of the lands. 1/ Therefore, the BLM was not in error in this regard, and its decision must be affirmed.

[4] On May 2, 1961, the State of Alaska filed selection applications A-054326, A-054327, A-054328, and A-054329, all for land located in T. 10 S., Rs. 55, 56 W., Seward Meridian, Alaska. Eventually, the applications were combined into A-054326 and A-054328. However, on June 17, 1974, the native village of Alekganik selected virtually all of the lands in the township. The BLM then rejected the State applications.

In its appeal the State of Alaska suggests that it is unfair that the State must pay filing fees for the land it has selected while native villages and other groups are not required to make a similar payment. In the alternative, the State asks that the moneys paid for the filing fees be returned. As previously noted, section 6(g) of the Alaska Statehood Act, 48 U.S.C. Chapter 2 (1970), provides that the Secretary may issue such regulations as are necessary for the conveyance of lands to the State of Alaska. Section 25 of ANCSA, 43 U.S.C. § 1624 (Supp. III, 1973), in like manner, provides that the Secretary may issue such regulations as are necessary to carry out the purpose of that Act. The State of Alaska is required to pay non-refundable filing fees with its applications for selection. 43 CFR 2627.3(c)(2). There is no comparable requirement in the regulations pertaining to native selections pursuant to ANCSA. 43 CFR Part 2650. Since this Board has no authority to overrule regulations validly promulgated by the Secretary, the decision of the BLM must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision pertaining to lot 23 in state selection application A-067435 is reversed; the remaining decisions are affirmed.

Edward W. Stuebing
Administrative Judge

1/ See 43 CFR 2650.5-6

We concur:

Martin Ritvo
Administrative Judge

Joan B. Thompson
Administrative Judge